RAJA NONG CHIK v. PUBLIC PROSECUTOR

[A.Cr.J. (Raja Azlan Shah J.) July 7, 1970]

[Kuala Lumpur — Criminal Appeal No. 41 of 1970]

Companies — Directors — Commercial morality expected of company directors — Dealings with company shares — Companies Act, 1965, ss. 134 and 135.

The appellant in this case was charged and convicted by the President of the Sessions Court, for non compliance with section 135 of the Companies Act, 1965. Section 135 imposes a general duty to make disclosure:

(1) "Every director shall give such notice to the company of such events and matters relating to himself as may be necessary or expedient to enable the company or its officers to comply with the requirements of this Act." (2) "Any such notice shall be in writing and shall be given within seven days of the occurrence of the event or of the matter becoming relevant and, if it is not given at a meeting of the directors, the director giving it shall take reasonable steps to secure that it is brought up and read at the next meeting of directors after it is given. Penalty: Imprisonment for one year or two thousand five hundred dollars." (3) "Any person who is for the time being beneficially entitled to 5% or more of the issued equity shares of a company shall for the purposes of this section and section 134 and notwithstanding any provision of this Act to the contrary, be deemed to be a director and the provisions of this section and section 134 shall with such adaptations as are necessary extend and apply accordingly."

Held: the commercial morality expected of company directors is too well-known to be reiterated. Directors are expected to observe a high standard of conduct in connection with dealings with their own shares. They may buy or sell shares in the company in the ordinary course and the fact that they usually know more about their company than the other party to the transaction is no bar; but when they do buy or transfer shares, they have to notify the company in writing within seven days of the occurrence.

MAGISTRATE'S CRIMINAL APPEAL.

Raja Abdul Aziz bin Raja Addruse (*D. S. Nath* with him) for the appellant.

Ajaib Singh (Deputy Public Prosecutor) for the respondent.

Raja Azlan Shah J. (delivering oral judgment): The commercial morality expected of company directors is too well-known to be reiterated. Directors are expected to observe a high standard of conduct in connection with dealings with their own shares. They may buy or sell shares in the company in the ordinary course and the fact that they usually know more about their company than the other party to the transaction is no bar; but when they do buy or transfer shares, they have to notify the company in writing within seven days of the occurrence. Recognition of this requirement is given statutory recognition by section 135 of the Companies Act, 1965.

In the present case there were resolutions passed by the board of directors with regard to the acquisition and transfer of shares. The company therefore knew of the occurrence of this event. In my view section 134 is directed against directors who bought or transferred shares without the knowledge of the company. Without such knowledge the company would not be in a position to fulfil the requirement of section 134.

Even though the appellant had pleaded guilty to the charge it is the bounden duty of the prosecution to acquaint the court with the full facts so that in an appeal such as the present, the appeal court will be in a position to consider the matter. In the present case not only were the facts not fully presented but it is unfortunate that the learned president took extraneous things into consideration. Had the lower court known about the facts regarding the acquisitions and transfers, he might have taken a different view in assessing sentence. For these reasons I take the view that the sentence imposed by the learned president was excessive. I will reduce the fine to a sum of $1,000 or 6 months' imprisonment in default.

Sentence varied.

Solicitors: *Rithauddeen & Aziz.*

CHOW YOKE PUI v. TAN TUAN BOON & ORS.

[O.C.J. (Sharma J.) August 28, 1970]

[Malacca — Civil Suit No. 61 of 1969]

Partnership — Dissolution — Valuation of shares — Appointment of adjudicator — Whether adjudicator a valuer or arbitrator — Validity of award — Whether award final.

The plaintiff had withdrawn from a partnership agreement with the first defendant and one other, and the first defendant had agreed to purchase the plaintiff's share. It was necessary to value the plaintiff's share in the partnership business and it was agreed between the plaintiff and the first defendant to appoint Messrs. Evatt & Co. to be valuers of the plaintiff's share and to appoint one Koh Kim Leng to be the "adjudicator to adjudicate upon the valuation and report of Evatt & Co. after considering the comments and representations of the parties and he may in his absolute discretion summon before him either collectively or separately the parties thereto to resolve any difficulties which may appear from the comments and representations made by the parties." Messrs. Evatt & Co. duly made their valuation and the adjudicator made his award. Thereupon the plaintiff asked the first defendant for payment of the award. The first defendant alleged that the adjudicator had made no award as required by the agreement. The plaintiff brought an action against the defendants and the following issues were agreed to be tried as preliminary issues:

(1) Whether Koh Kim Leng was a valuer or an arbitrator?

(2) Was the award made or purported to be made by Koh Kim Leng final?

(3) Are the defendants estopped from challenging the validity of the award made by Koh Kim Leng?

The second defendant had given a bank guarantee whereby it had agreed on behalf of the first defendant the payment of the purchase price of the plaintiff's share in the manner provided by the partnership agreement.

Held: (1) in the circumstances of this case as Koh Kim Leng was not required to hold any judicial inquiry the intention of the parties was to appoint him as valuer and not as arbitrator;

(2) there was no allegation of any dishonest intention on the part of the adjudicator and there was no evidence on which it could be held that the valuation given by the adjudicator was not *bona fide* and that he did not take into consideration matters which he should have. In the circumstances therefore the award made by the adjudicator was final;

(3) in this case no plea of *estoppel* had been raised by the plaintiff against the defendants and the defendants cannot

say that it was available against them. The third issue therefore did not arise;

(4) the plaintiff in this case could not rely upon the guarantee given by the second defendants in this claim which was based entirely on the agreement between him and the first defendant and the award made by the adjudicator.

Cases referred to:-

(1) *Collins* v. *Collins*, (1858) 26 Beav. 306; 53 E.R. 916.

(2) *Leeds* v. *Burrows*, 12 East 1; 104 E.R. 1.

(3) *Parkes* v. *Smith*, 15 Q.B. 305; 117 E.R. 470.

(4) *Re Carus-Wilson and Greene*, (1886) 18 Q.B.D. 7.

(5) *Wadsworth* v. *Smith*, (1871) L.R. 6 Q.B. 332.

(6) *Scott* v. *Liverpool Corporation*, (1858) 28 L.J. Ch. 230; 44 E.R. 1297.

(7) *Finnegan* v. *Allen*, [1943] 1 K.B. 425.

(8) *Pappa* v. *Rose*, (1872) L.R. 7 C.P. 32.

(9) *Monro* v. *Bognor Urban Council*, [1915] 3 K.B. 167.

(10) *Charles* v. *Cardiff Collieries Ltd.*, (1928) 44 T.L.R. 448.

(11) *Re An Arbitration between Hammond and Waterton*, (1890) 62 L.T. (N.S.) 808.

(12) *Dawes* v. *Tredwell*, (1881) 18 Ch. D. 354.

(13) *Mackenzie* v. *Duke of Devonshire*, [1896] A.C. 400, 405.

(14) *Dean* v. *Prince*, [1954] Ch. 409.

CIVIL SUIT.

S.D.K. Peddie for the plaintiff.

R.R. Chelliah for the 1st defendant.

Chan Yew How for the 2nd defendant.

Cur. Adv. Vult.

Sharma J.: Chua and Company is a firm of stock and share brokers at Malacca. On 1st June 1965 a number of partners of this firm agreed to retire and, subject to the terms and conditions contained in the agreement dated 1st June 1965 (Exhibit A1), a new partnership under the same name and style was to come about. The new partnership was to consist of (1) the plaintiff, (2) Tan Tuan Boon (he is now dead, but was sued as the first defendant in this suit and his widow Soon Kuo Hsiang has after his death been appointed to represent his estate. Tan Tuan Boon deceased is hereinafter for convenience referred to as the first defendant) and (3) S. R. Doshi. Clauses 15 (c), 16, 17, 18, 19 and 20 of the partnership agreement provide as follows: —

"15 (c). The parties hereto shall not without mutual consent deal or transact business with or lend any of the assets of the new partnership or deliver any stocks, shares or securities thereof upon credit to any person whom the other party hereto shall previously in writing have forbidden him so to do.

16. The new partnership may be determined by any of the parties hereto giving the other parties six months' notice in writing expiring on the 31st day of December in any year.

17. If the new partnership shall be determined by notice pursuant to the last preceding clause or dissolved by the death or bankruptcy of any party hereto or by order of court the parties to whom notice is given or the surviving or solvent party or the party on whose application such order was made as the case may be within one month from such death or bankruptcy or the making of such order as the case may be by notice in writing to the other parties or his personal representatives, trustee in bankruptcy or receiver in lunacy elect either to have the new partnership wound up pursuant to the provisions of the Partnership Act or any statutory modification thereof for the time being in force or to purchase the share of the other parties hereto at the net value thereof as ascertained by a single independent valuer, if the parties agree upon one or three independent valuers one to be appointed by each of the parties hereto or the personal representative, trustee in bankruptcy or receiver in lunacy of a deceased insolvent or insane party and in making such valuation the goodwill of the business shall be taken into account.

18. On the purchase of one party hereto of the shares of the other party or parties hereto pursuant to the last preceding clause hereof the purchase money shall be paid with interest at the rate of 5 percent per annum from the date of determination or dissolution of the new partnership within one month from such date.

19. If any of the parties hereto shall fail to make any payment or omit to do any act as required under any clauses hereof or shall commit any breach of any of the stipulations contained herein he shall indemnify the other party or parties hereto for all losses and expenses resulting therefrom.

20. All disputes between the parties hereto in relation to any matter whatsoever touching the new partnership or the construction of the agreement and whether before or after the termination of the new partnership shall be referred to a single arbitrator if the parties agree upon one and if not to three arbitrators one to be appointed by each of the parties hereto in accordance with and subject to the provisions of the Arbitration Ordinance 1950 or any statutory modification thereof for the time being in force."

Exercising his powers under clause 16 of the partnership agreement the plaintiff withdrew from the partnership on 31st December 1967 and the first defendant agreed to purchase the plaintiff's share (see A6 & A7). Clause 18 of the partnership agreement contemplated that the first defendant should pay the price for the purchase of the plaintiff's share on or before 31st January 1968. The value of the plaintiff's share in Chua & Co. as on 31st December 1967 had, however, to be valued. The plaintiff required the first defendant to furnish a bank guarantee to the extent of the par value of the plaintiff's share in the partnership which was to be the value as on 31st December 1967. The first defendant agreed to furnish a bank guarantee to the satisfaction of the plaintiff (see A21) but at the same time filed a suit against the plaintiff and S. R. Doshi for, among other reliefs, payment by him to the plaintiff of the value of the plaintiff's share in Chua & Co. at a price to be ascertained in accordance with clause 17 of the partnership agreement and for the assignment by the plaintiff of his share in the partnership to the first defendant. This suit was Malacca High Court Civil Suit No. 210 of 1967 (see A25 & A29). The correspondence which passed between the solicitors for the plaintiff and the first defendant shows that there was no serious dispute left between the parties and under an arrangement arrived at Messrs. Evatt & Co. were appointed by the parties to be the valuers of the plaintiff's share and the material date for purposes of this valuation was to be 31st December 1967. The first defendant also on 22nd December 1967 furnished a bank guarantee by the second defendant whereby the second defendant guaranteed payment to the plaintiff to the extent of $62,475. The material parts of the guarantee (A41) provide as follows: —

"*Now we hereby guarantee* that the purchase price to be ascertained or fixed as aforesaid but not exceeding the sum

of dollars sixty two thousand four hundred and seventy five ($62,475.00), shall become payable to you by us in the event of Tan Tuan Boon failing to pay the said purchase price to you within one (1) month from date of such ascertainment of purchase price as aforesaid.

It is understood that the maximum liability herein is only the sum of dollars sixty two thousand four hundred and seventy five ($62,475.00) and the purchase price so ascertained as aforesaid will only be paid to you in exchange for a valid Assignment of your share and interest in the said Partnership to Tan Tuan Boon or his nominee or nominees and on your signing the necessary Business Registration forms affecting such changes in the partnership."

It, however, appears that Messrs. Evatt & Co. were not given permission by Chua & Co. to examine their books (see A52) and this led the plaintiff to file a suit against the first defendant for an order that the first defendant do authorise Evatt & Co. to carry out the valuation of the plaintiff's share in the partnership and that he should provide them full access to all the records of the partnership and that the first defendant should pay the plaintiff such sum as may be found due to him on the valuation of Evatt & Co. This suit was Malacca High Court Civil Suit No. 16 of 1968. There were thus at that stage two suits pending in the High Court at Malacca between the plaintiff and the first defendant, namely Civil Suit No. 210 of 1967 (*Tan Tuan Boon* v. *Chow Yok Pui and S. R. Doshi*) and Civil Suit No. 16 of 1968 (*Chow Yoke Pui* v. *Tan Tuan Boon*) concerning the plaintiff's retirement from the partnership. The first defendant entered an appearance in Civil Suit No. 16 of 1968 and filed an application for stay of proceedings under section 5 of the Arbitration Ordinance 1950. He relied upon clauses 17 and 20 of the partnership agreement and contended that "the matters in dispute in this action aforesaid are all within the scope of the said agreement to refer the difference arising thereunder to arbitration." The plaintiff contested the application for stay and in his affidavit (A72) in paragraphs 3 and 4 stated:

"3. As regards paragraph 2 of the said affidavit I admit that this action arises under clause 17 of the partnership agreement referred to and I admit the said clause 17 is as stated. I do not admit any disputes have arisen as to the operation of the clause and I maintain the defendant has concurred in the appointment of Evatt & Co. to be a single independent valuer.

4. On the 30th day of November 1967 the defendant issued a writ against me and one S.R. Doshi being Malacca High Court Civil Suit No. 210 of 1967 in which *inter alia* he prayed as against me specific performance of an agreement made between me and the defendant on the 14th July 1967 for the sale by me to the defendant of my shares in Chua & Co. and in which he asked for an enquiry as to the purchase price of my shares as at the 31st day of December 1967. He further prayed that I should receive from him and he should pay to me the sum ascertained within one month from the date of ascertainment. The agreement he relied on is the one referred to in paragraph 4 of the statement of claim in my action and I am praying substantially the same reliefs in my action as he prayed in his as referred to in this paragraph. By paragraph 9 of his statement of claim the defendant in his action professed himself as being ready and willing to perform his obligations for the purchase of my shares. A comparison of the actions shows that we are at one in maintaining he has the right to purchase my shares and that the sum to be paid by him to me is to be ascertained by having a valuation carried out and that the sum found due is to be paid within one month of the date on which it is ascertained."

This application came up for hearing in chambers on 26th February 1968 and was dismissed. The first defendant thereupon applied for the adjournment of the application into open court under 0.54 r.22A of the Rules of the Supreme Court. The hearing in open court was fixed for 14th March 1968 when Mr. Ball appeared for the first defendant and informed the court that the matter had been settled between the parties. The minutes for 14th March 1968 also show that a document containing the terms of the settlement was produced to the court and that document is A89. According to the said minutes the first defendant gave an undertaking to obtain the signature of S. R. Doshi to the letter dated 14th March 1968 addressed by the parties to Evatt & Co. That letter is A88. Mr. Mooney appearing for the plaintiff confirmed those terms of the settlement.

By the agreement (A89) dated 14th March 1968 the plaintiff and the first defendant irrevocably appointed Evatt & Co. to *assess* the value of the assets (including the goodwill) of Chua & Co. as on 31st December 1967 after taking into account the liabilities of the firm. The material clauses of the agreement are clauses 4, 5, 6 and 7 which read as follows: —

"4. The valuation and report made by Evatt & Co. will as soon as practicable be supplied to the parties hereto and to the adjudicator, and within one week of receipt thereof by the respective parties hereto each party will submit in writing to the adjudicator any comments and or representations they desire to make upon the valuation, accounts and report.

5. The parties hereto hereby appoint Koh Kim Leng Esq. to be the adjudicator to adjudicate upon the valuation and report of Evatt & Co. after considering the comments and representations of the parties, and he may in his absolute discretion summon before him either collectively or separately the parties hereto to resolve any difficulties which may appear from the comments and representations made by the parties under the foregoing paragraph.

6. The adjudicator will as soon as practicable give his award i.e., the final figure payable in respect of the share of the 2nd party to be paid by the 1st party to the 2nd party within one month from the date of such award and any other directions, and his award will be final and binding on both parties hereto, and no appeal shall lie therefrom.

7. Upon the signing of this agreement the parties will give instructions to their respective lawyers to submit to or agree in court that the various cases now before the court in connection with the disputes recited aforesaid have been settled on the terms embodied in this agreement."

It will thus appear that Evatt & Co. were to make the valuation of the assets of Chua & Co. (see clause 1 of A89) and to submit a report of their valuation to the plaintiff and the first defendant as well as to Mr. Koh Kim Leng who was appointed the adjudicator. The plaintiff and the first defendant had the right to make written submissions to the adjudicator on the valuation and report prepared by Evatt & Co. *These submissions were to be made within one week of the receipt by them of the valuation and report of Evatt & Co.* The duties and functions of the adjudicator were to adjudicate on the valuation and report prepared by Evatt & Co. after taking into consideration the written submissions and comments received by him from the plaintiff and the first defendant. It was the adjudicator who was to give his award and to name the final figure which according to his decision was payable by the first defendant to the plaintiff. The decision was to be arrived at by having regard to and by consideration of the valuation and report prepared by Evatt & Co.

and the submissions and comments on that report by the parties to the Agreement. The award of the adjudicator was to be final and binding and there was to be no appeal to that award. Malacca High Court Civil Suit Nos. 210 of 1967 and 16 of 1968 were agreed to be settled as provided by the said agreement.

Messrs. Evatt & Co. in due course made their valuation. From the documents produced and admitted it does appear that the first defendant submitted a memorandum to the adjudicator on 3rd October 1968 (A97) and again on 27th November 1968 sent his comments and representations on the valuation and report of Evatt & Co. (B 136). The parties also appeared before the adjudicator on 17th October 1968 (B 120). The adjudicator made his "award" on 5th December 1968 (See A103). The adjudicator determined the value of the shares of Chua & Co. at $2.44 per share. He was under the agreement dated 14th March 1968 required to fix the sum which the first defendant was to pay to the plaintiff. This on the face of the award he did not do. He accepted all the figures arrived at by Evatt & Co. in their valuation of the nett assets of Chua & Co. (including the goodwill) as on 31st December 1967 except their valuation of the trade investment which they had valued at $150,000. The adjudicator reduced this to a sum of $112,500. In doing so the adjudicator seems to have made personal inquiries in the matter and to have studied the general market conditions. In his "award" (A-103) he says "I assess the current value of the trade investment at $112,500." It has been suggested that this means that he determined the value as on 5th December 1968 and not on 31st December 1967 as he was required to do. Another point to be noted about this "award" is that although it is dated the 5th of December 1968, it says "I therefore value the shares of Messrs. Chua & Co. *as on 31st December 1968* at $2.44¢ each" (italics supplied). This was obviously a clerical mistake. Evatt & Co. had given their valuation of Chua & Co. as on 31st December 1967 which was the material date under the agreement dated 14th March 1968. The basis of the award of the adjudicator is the valuation of Evatt & Co., which valuation except for the item of trade investment the adjudicator had accepted in full. On the 6th December 1968 he forwarded his "award" to the solicitors of the first defendant (see B 143). An objection has also been taken to the "award" on that ground, namely that the valuation is as on 31st December 1968 and not 31st December 1967. I think there is no merit in that contention. The year *1968* has appeared instead of *1967* in the award merely by a typing error. The adjudicator could not possibly have arrived at the value of each share of Chua & Co. as on 31st December 1968 when his award A103 was itself ready on 5th December 1968.

After the adjudicator had made his award the plaintiff asked the first defendant for payment together with interest at the rate of 5% per annum with effect from 1st January 1968 (See A 105). The plaintiff also informed the second defendant that the liability of the first defendant had been ascertained and that if he did not make the payment the second defendant would be liable as provided for in the guarantee A41. (See A 104). The second defendant agreed to pay the sum of $62,475 only upon what it called the fulfilment of the conditions precedent contained in the last paragraph of the guarantee (See A 106). The first defendant's stand to the demand of the plaintiff was that the adjudicator had made no award as required by the agreement dated the 14th March 1968.

In that background of facts the plaintiff filed the present suit on 4th March 1969. The defence of the first defendant in short is that there is no enforceable award made by the adjudicator on the ground that (a) no final figure payable by the first defendant to the plaintiff is stated in the alleged award which only gives the value of each share of Chua & Co.; (b) the alleged award has not been made as required by the agreement dated 14th March 1968; (c) the value of the shares determined by the adjudicator is as on 31st December 1968 and not as on 31st December 1967.

An allegation has also been made in the defence of the first defendant that the plaintiff had caused loss to the partnership by dealing with one Chua Sin Ean and that the plaintiff owed the partnership and the first defendant a sum of $17,428.23 as on 31st December 1967. The first defendant has nowhere in his defence indicated the object for making that allegation or what its possible effect would in law be if that allegation was proved unless it is said that it was meant to be put forward in support of the contention that the adjudicator had failed to take into consideration the written comments and representations of the first defendant on the valuation of Evatt & Co. and had therefore not made any award as was required under the agreement dated 14th March 1968.

As far as the defence of the second defendant is concerned, it says that its liability under the guarantee could arise only after the purchase price payable by the first defendant had been ascertained and not until then, that the sum of $62,475.00 payable by it under the guarantee was to be paid only if the plaintiff executed an assignment of his share and interest in the partnership in favour of the first defendant and if the plaintiff further signed the necessary business registration forms and that these constituted conditions precedent to any liability of the second defendant. The rest of its defence follows the defence of the first defendant. It should, however, be noted that the defence of the second defendant does show that it had knowledge of the agreement dated 14th March 1968 between the plaintiff and the first defendant and the contents of that agreement. It also indicates its knowledge of the "award" made by the adjudicator on 5th December 1968 (see paragraphs 2, 3, 4 & 5 of its defence). In paragraph 6 of its defence it admits that the plaintiff was at all material times and continued to be ready to execute all documents which were necessary to effect a transfer of his share in the partnership to the first defendant but this willingness was conditional on the first defendant paying the purchase price and interest.

The following issues were agreed to be tried as preliminary issues: —

1. Whether Mr. Koh Kim Leng was a valuer or an arbitrator?

2. Is the award made or purported to be made by Mr. Koh Kim Leng final?

3. Are the defendants stopped from challenging the validity of the award made by Mr. Koh Kim Leng?

On 19th August Mr. Chelliah agreed that there were no other issues which were to be tried or determined in the suit. Mr. Chan, however, did not like to commit himself at that stage of the proceedings.

Arbitration differs from valuation inasmuch as, in valuation, there is *generally* no difference or dispute between the parties. In the case of valuation the parties intend that the valuer shall, without taking evidence or hearing arguments, make his valuation according to his own skill, knowledge or experience. In the case of *Collins* v. *Collins*[1] Sir John Romilly, the Master of the Rolls, observed:

"It becomes necessary, therefore, to consider what an arbitration is. Now I fully concur in the observation that fixing the price of a property may be 'arbitration'. But I do not think that in this particular case, the fixing of the price of the property is an arbitration, in the proper sense of the term. An arbitration is a reference to the decision of one or more persons, either with or without an umpire, of some matter or matters in difference between the parties. It is very true that in one sense it must be implied that although there is no existing difference, still that a difference may arise between the parties; yet I think the distinction between an existing difference and one which may arise is a material one, and one which has been properly relied upon in the case.... It may well be that the decision of a particular valuer appointed might fix the price and might be equally satisfactory to both; so that it can hardly be said that there is a difference between them. Undoubtedly, as a general rule, the seller wants to get the highest price for his property and the purchaser wishes to give the lowest, and in that sense it may be said that an *expected difference* between the parties is to be implied in every case, but unless a difference has *actually arisen*, it does not appear to me to be an 'arbitration'. Undoubtedly, if two persons enter into an arrangement for the sale of any particular property and try to settle the terms but cannot agree, and after dispute and discussion respecting the price, they say, 'we will refer this question of price to A.B., he shall settle it', and thereupon they agree that the matter shall be referred to his arbitration, that would appear to be an 'arbitration' in the proper sense of the term and within the meaning of the Act; but if they agree to a price to be fixed by another, that does not appear to me to be an arbitration.

It appears to me that the case of *Leeds* v. *Burrows*[2] draws the proper and fit distinction between an *arbitration* in the proper sense of the term and an appraisement or valuation, for valuation undoubtedly precludes differences, in the proper sense of the term; it prevents differences and does not settle any which have arisen. That is the distinction which, in my opinion, exists between those cases of appraisement and those cases of arbitration. The distinction seems to be drawn in the case of *Hemingway's case* cited in a note to the case of *Parkes* v. *Smith*.[3] There there was an agreement to sell land at a particular price to be fixed by award, the price was fixed, and they came for an attachment under the award and said it was an arbitration; but Mr. Justice Littledale very clearly pointed out the distinction; he says, 'this is not properly an arbitration, it is in effect an agreement to sell the land, and this is not a settlement of any difference between them but merely something auxiliary to the contract entered into between them, for the purpose of the sale of the land. And accordingly, upon a breach of the contract, you have your remedy, for it is clear, that a specific performance would have lain here in that case. It is clear also, that an action would have lain for damages, but not being an award, because it was not a matter in difference that was referred by these parties, you cannot have it by way of attachment'."

In *Re Carus-Wilson and Greene*[4] Lindley L.J. said:

"A valuer may be, in one sense, called an arbitrator, but not in the proper legal sense of the term. In the ordinary cases of arbitration there is a dispute which is referred. The object of the valuation, on the other hand, is to avoid disputes."

Lord Esher M.R. in the same case said:

"If it appears from the terms of the agreement by which a matter is submitted to a person's decision, that the intention of the parties was that he should hold an inquiry in the nature of a judicial inquiry, and hear the respective cases of the parties, and decide upon evidence laid before him, then the case is one of an arbitration. The intention in such cases is that there shall be a judicial inquiry worked out in a judicial manner. On the other hand, there are cases in which a person is appointed to ascertain some matter for the purpose of preventing differences from arising, not of settling them when they have arisen, and where the case is not one of arbitration but of a mere valuation. There may be cases of an intermediate kind, where, though a person is appointed to settle disputes that have arisen, still it is not intended that he shall be bound to hear evidence or arguments. In such cases it may be often difficult to say whether he is intended to be an arbitrator or to exercise some function other than that of an arbitrator. *Such cases must be determined each according to its particular circumstances.*"

The agreement dated the 14th March 1968 (A89) whereby Mr. Koh Kim Leng was appointed adjudicator only contemplates that the adjudicator should adjudicate upon the valuation and report of Evatt & Co. after considering the written comments and representations of the parties. He was in his absolute discretion at liberty to summon before him either collectively or separately the parties in order to resolve any *difficulties* which appeared to him in the written comments and representations made by the parties. The parties were entitled to submit in writing their comments and/or representations *upon the valuation and report of Messrs. Evatt & Co.* All that the adjudicator was required to do was to study the valuation and report of Messrs. Evatt & Co. and to consider the written comments and representations of the parties and it was only in case he had any difficulty which appeared from a study of the written comments and representations of the parties that he in his absolute discretion was empowered to ask the parties to appear before him in order to resolve these difficulties for his better understanding of those comments and representations. It was not necessary for him to call them if he so desired. He *was not bound to hear* evidence or arguments. In fact the whole tenor of the agreement (A89) indicates that he was not to hold any judicial enquiry.

While it may be true in some cases to say that an arbitration decides disputes and valuation prevents disputes, this observation or *dictum* cannot be of universal application. The matter has to be decided according to the circumstances of each particular case by gathering the intention of the parties. The matter is stated thus in *Halsbury's* Laws of England, 3rd Edition, Volume 39, at page 4:

"The distinction between valuation and arbitration is usually expressed by saying that an arbitrator is appointed to determine a certain matter, such as the price of goods, for the purpose of settling a dispute which has arisen between the parties, but that a valuer is appointed to determine such a matter before any dispute has arisen and with the object

of preventing any dispute. There is much authority in support of that view, but it may be doubted whether it can be accepted as an absolute test."

In *Wadsworth* v. *Smith*[5] Blackburn J. said:

"Where by an agreement the right of one of the parties to have or do a particular thing is made to depend on the determination of a third person, that is not a submission to arbitration, nor is the determination an award."

In *Scott* v. *Liverpool Corporation*[6] it is said:

"Where the contract provides for the determination of the claims and liabilities of the contractors by the judgment of some particular person, this would be incorrectly called a provision for submission to arbitration."

In the case of *Finnegan* v. *Allen*[7] Goddard L.J. said:

"The distinction between an arbitrator and what the courts have called a quasi-arbitrator is not, I think, capable of precise definition. It depends on the nature of the matter submitted for decision and the reason for the submission. The question of the quality of an article being sold is often submitted for determination as between the parties to a commercial contract as it was in *Pappa* v. *Rose*.[8] The person to whom the matter is submitted does not as a rule sit as an arbitrator to hear the parties and take evidence as an arbitrator must. The person appointed will be an expert in the trade who will look at the sample on which the goods were sold and at a sample of the goods delivered and fix the allowance to be made. This is constantly done in Mincing Lane, and the person who acts in this way is, perhaps, a quasi-arbitrator or even an arbitrator, but he is an arbitrator of a particular sort, and it is not intended that there should be the same judicial proceeding on his part as there would be in the case of an arbitrator appointed under a formal submission. It is clear from the cases cited that a valuer comes within the protection given to arbitrators when he occupies a position like that of the defendant in this case. The underlying principle is that, in accepting the task submitted to him, the valuer or arbitrator merely undertakes to give an honest decision between the parties. Mr. Raeburn contends that an action will lie against a person employed to determine the value of a piece of property by applying a certain formula, if it can be shown that he has not applied that formula. I think one must go much further, and that it must be shown not only that he has failed to apply the formula, but also that he has refused to do so dishonestly or for some improper reason."

In *Kennedy* v. *Barrow-in-Furness Corporation*, a case decided in 1909, and referred to in *Hudson* on Building Contracts, Edition 4, Vol. 2, at page 411, the agreement provided that an engineer was to be the exclusive judge on all matters arising out of the contract and his certificate was to have the force of an award. It was held that the engineer was not an arbitrator and Buckley J. observed:

"He (the engineer) is the person whose determination is required by the parties. It is not a judicial act, but it is an administrative act in the interests of the corporation who is going to pay, and he is to be the judge, or a kind of arbitrator or a person whose decision is to be final in the matters of the execution of the works. I do not think that means he is an arbitrator or acting in a judicial capacity at all."

This case has been referred to with approval by Pickford L.J. in *Monro* v. *Bognor Urban Council*.[9]

In *Charles* v. *Cardiff Collieries Ltd.*[10] Scrutton L.J. has pointed out that the decision of a chairman of the conciliation board was not an award within the meaning of the English Arbitration Act and the mere fact that the parties had called the chairman's decision an award or had called him an arbitrator, seemed to his Lordship a matter of very small importance, and that by no means introduced the whole machinery of the Arbitration Act 1889 with its special powers to review the decisions of a tribunal within the Act.

One of the essential ingredients of a submission for arbitration is that the parties should intend that the dispute intended to be referred should be determined in a *quasi*-judicial manner. If it is not to be so determined, the agreement does not amount to a submission to arbitration and the person who decides the dispute is not an arbitrator. Therein lies the distinction between an agreement for submission to arbitration and an agreement to accept the decision of a valuer, appraiser or of the counsel for the parties. In all such cases there is no *animus arbitrandi*.

It seems clear from the authorities that once a person is permitted to give a decision which is not a judicial decision, that decision can never be considered as an arbitrator's award. The most important characteristic of an award is that it must emanate from a judicial examination. An award must be the result of a judicial decision and when you have a decision which is the result of a discretion and an absolute discretion exercised by a person, that decision cannot in the very nature of things be an award. In order to constitute a judicial decision there should not only be a judicial inquiry but also a judicial determination. Mr. Koh Kim Leng was not to decide upon any evidence which the parties chose to lead. In fact the only material which he was bound to consider was the valuation and report of Evatt & Co. and the written comments and representations of the parties touching upon that valuation and report. The agreement does not provide that the parties could produce any evidence they liked before the adjudicator. The ambit of the consideration which could lead Mr. Koh Kim Leng to his decision was limited by the terms of the agreement itself. A judicial decision could only be the result of evidence taken in a judicial manner. This element of the judicial inquiry was obviously lacking in the role and the duties which Mr. Koh Kim Leng was supposed to perform.

In a valuation the parties intend that the valuer should make the valuation according to his own skill, knowledge and experience but in the case of an arbitrator he proceeds in a *quasi*-judicial manner. Where the parties intend that the person appointed should act as a valuer and not as an arbitrator and that the decision is to be made by him in his absolute discretion, the mere fact that he is bound to observe the principles of natural justice and hear the parties before giving his decision does not make the decision an award. In the case of *Re an Arbitration Between Hammond and Waterton*[11] Williams J. dealing with the case of *Re An Arbitration between Carus-Wilson & Greene*[4] said:

"I am satisfied that that case, when it is properly looked at, is really a consolidating case, which gathers together all the previous decisions and does not arrive at a conclusion inconsistent with those previous decisions. The decision does not show that every *obiter dicta* in previous cases is correct law, but that every decision may have its own proper place. The view which I take is this, that in every case it is necessary to look, not only at the exact words of the agreement, but also at the subject-matter with which the agreement deals.

Then it can be ascertained whether the parties intended that a mere valuation should take place or an arbitration. Sometimes the decisions which were given previous to *Re an Arbitration between Carus-Wilson and Greene (ubi sup.)* may be justified by the very words of the particular agreement, and sometimes they are based not upon the words, but with reference to the subject-matter; and again, in other cases the decisions are based partly upon one ground and partly upon another. But it is quite plain that after the decision of the Court of Appeal, to which I have just referred, the mere fact that an umpire is to be appointed in case the arbitrators are unable to agree does not of itself constitute the proceedings an arbitration. If there are any words in *Turner* v. *Goulden* (L.R. 9 C.P. 57) which go so far as to say that wherever there is a disagreement between arbitrators and an umpire is appointed you are necessarily to treat such proceedings as an arbitration, such a view of the law is overruled by a decision in *Re an Arbitration between Carus-Wilson and Greene (ubi sup.)*. And the Court of Appeal, holding as they did that the proceedings there did not constitute an arbitration, followed the decision in *Re Dawdy* (53 L.T. Rep. N.S. 800; 15 Q.B. Div. 426). It has been argued by Mr. Chitty that we cannot decide against him without overruling *Re Hopper* (L.R. 2 Q.B. 367), but that argument is not well founded. That case has been approved of again and again, and in no case has it been disapproved of, and it seems to me to be quite consistent with *Re an Arbitration between Carus-Wilson and Greene (ubi sup.)*. Now, *Re Hopper (ubi sup.)* was extremely like the present case, and was decided upon two grounds — first, it was held that it was an arbitration and not a mere valuation, because the parties had provided for evidence being taken and other judicial proceedings, whereas the agreement in *Carus-Wilson's* case contained no such provision; and the second ground is stated by Cockburn C.J. in the following words: 'The claim is one upon which it is quite obvious that the evidence of surveyors and of persons conversant with the value of real property under lease would be most important, and upon which the greatest difference of opinion might exist.' The claim in *Carus-Wilson's* case was of an entirely different kind, and the Court of Appeal points out that the umpire is not called in to settle judicially any matter in controversy between the parties; but that he is, by the exercise of his own knowledge and skill, to make a valuation, the object being to prevent disputes from arising, and not to settle them after they have arisen."

The mere fact that the adjudicator appointed in this case was an advocate and solicitor does not by itself mean that the parties intended that evidence should be heard by him and that the proceedings before him were to be judicial proceedings. The agreement (A89) does not contemplate any such thing. All that he was required to do was to use his own judgment and his own faculties by an examination of the valuation and report of Evatt & Co. and a consideration of such written comments and representations of the parties as they were entitled to make under clause 4 of the agreement. I consequently hold that in the circumstances of this case the intention of the parties was to appoint Mr. Koh Kim Leng as a valuer and not as an arbitrator.

An argument was advanced by Mr. Chelliah that two of the recitals in the agreement dated the 14th March 1968 said:

"AND WHEREAS it is necessary under the partnership agreement to value the share of the second party AND WHEREAS at a meeting held on the 12th day of March 1968 it was agreed to settle the disputes in the terms appearing hereinafter",

the partnership agreement dated the 1st day of June 1965 (A1) and the agreement dated the 14th day of March 1968 (A89) were to be read together, that Evatt & Co. were appointed valuers under clause 17 of the partnership agreement and Mr. Koh Kim Leng was appointed a single arbitrator under clause 20 of the partnership agreement. The argument may look attractive but I regret it has no force.

Clauses 17 and 20 contemplate either one or three valuers or one or three arbitrators respectively. S. R. Doshi was not a party to the agreement dated the 14th March 1968 and there is thus no question of Mr. Koh Kim Leng having been appointed an arbitrator under clause 20 of the partnership agreement. The agreement dated the 14th day of March 1968 (A89) is the repository of the terms of agreement between the plaintiff and the first defendant. The intention of the parties has to be gathered and ascertained from the language they had chosen to use and where such language is clear it is the language of that agreement alone which can govern the rights of the plaintiff and the first defendant. The partnership agreement dated the 1st April 1965 (A1) and the agreement A89 appointing Mr. Koh Kim Leng as the adjudicator evidence two separate and distinct transactions and to say that they are one has no meaning in law unless it can be said and proved that in respect of these separate transactions there was another agreement which was not evidenced in writing and this agreement provided that they should be treated as one.

Furthermore it is impossible by a recital to cut down the plain effect of the operative part of a deed, for where the operative part of an instrument is unambiguous the recitals have no effect. If the operative part is clear this alone is treated as expressing the intention of the parties. Recitals may, however, be used to explain the meaning of the operative part if such meaning appears doubtful to the court.

In *Dawes* v. *Tredwell*[12] Jessel M.R., said:

"The rule is that a recital does not control the operative part of a deed where the operative part is clear. The recital here, as is usually the case, is in general terms; the operative part is in definite terms. There is another rule that the recital of an agreement does not create a covenant where there is an express covenant to be found in the witnessing part relating to the same subject-matter. If, therefore, the covenant is clear, it cannot be controlled or affected by the recital."

In *Mackenzie* v. *Duke of Devonshire*[13] Lord Halsbury said:

"I simply look at the deed itself and I find that the provisions for the beneficiaries intended by this deed are satisfied by the persons claiming now as heirs female. I really have great difficulty in saying more than that, because if the language of the instrument itself is sufficiently clear as to the beneficiaries pointed to, as I think it is, and if the trust purposes are set forth in the paragraph of the deed which is appropriate to such purposes, it seems to me to be absolutely unarguable that the true meaning of those words, and the purposes of the trust so set forth, can be in any way controlled, qualified, or modified by the initial statement of what the motive of the author of the deed was. It would to my mind be disastrous to introduce such a system of construing a deed. One has known the language of a will somewhat perverted to perform the function which it was assumed the testator intended to be performed, but I never in my life heard of the language of a deed which contained a perfectly unambiguous provision being twisted from the natural ordinary meaning of the words by a preliminary statement of what the maker of the deed intended should be the effect and purpose of the whole deed when made. I should say that even if there were some contradiction between what was done and the supposed purpose."

Lord Davey in the same case said:

"I take it to be a settled principle of law that the operative words of a deed which are expressed in clear and unambiguous language are not to be controlled, cut down, or qualified by a recital or narrative of intention."

The valuation report of Messrs. Evatt & Co. (Ex. D1) reads as follows:

"24th September 1968.

Messrs. Tan Tuan Boon and Chow Yoke Pui,
MALACCA.
Gentlemen,

Messrs. Chua and Company

In accordance with an irrevocable agreement entered into between you on 14th March, 1968, we have been appointed to express our opinion as to the value of the shares of Messrs. Chua & Co. at 31st December 1967.

2. After taking into account all matters that we consider relevant to the discharge of our appointment, we are of the opinion that the 81,415 shares of the partnership were at 31st December 1967 worth $2.90 each.

Yours faithfully,
Sd. EVATT & CO."

They had valued each share of Chua & Co. as on 31st December 1967 at $2.90. Clause 1 of the agreement (A 89) required Evatt & Co. to "assess the value of its assets including goodwill as provided in the partnership agreement after deduction of liabilities as on the 31st December 1967." They did not assess the total value of Chua & Co. but took into account all matters which were relevant to the discharge of their duties. It was a simple matter of arithmetic to arrive at the total value of Chua & Co. as on 31st December 1967. In their letter dated 14th November 1968 they in fact valued it at $236,000. Mr. Koh Kim Leng adopted the valuation of Evatt & Co. except for a trade investment which he reduced to $112,500. The valuation given by Evatt & Co. was as on 31st December 1967. The trade investment they took into account was the investment as on 31st December 1967 (See A95 and A101). It is thus obvious that Mr. Koh Kim Leng, when he reduced Evatt & Co.'s valuation of each share of Chua & Co. from $2.90 per share to $2.44 per share, took into account the material date for the purpose of such reduction as 31st December 1967 and not 31st December 1968 as suggested by the counsel for the first defendant. The first defendant himself in his comments and representations dated 27th November 1968 (B 136 at B 142) agreed that the plaintiff held 62,475 shares in Chua & Co. The adjudicator, as I have said earlier and under the terms of clause 5 of the agreement (A89) was to "adjudicate upon the valuation and report of Evatt & Co. after considering the comments and representations of the parties." Neither the valuation and report of Evatt & Co. (D1) nor their supplementary report (A95), nor their letter (A101) gave the number of shares held by the plaintiff in Chua & Co.

It seems the plaintiff did not make any comments on the valuation and report of Evatt & Co. The first defendant did, however, in his comments and representations (B136) dated 27th November 1968 inform the adjudicator that the plaintiff held 62,475 shares. The comments and representations which the parties were entitled to make to the adjudicator were to be upon the "valuation, accounts and report" of Evatt & Co. and these were to be made within one week of the receipt by them of Evatt & Co.'s valuation (Ex D1). The comments of the first defendant therefore on the shares held by the plaintiff in Chua & Co., or his entitlement as indicated in B136 were irrelevant (see page 142 of B136) as such comments were not upon the "valuation, accounts and report" of Evatt & Co. The adjudicator was thus right in not taking into account the representation made by the first defendant as to the number of shares held by the plaintiff. What the adjudicator did in fact do in making his award or valuation was to adopt the mode of valuation which Messrs. Evatt & Co. had done, i.e. he valued each share of Chua & Co. as on 31st December 1967 in the same way and following the valuation and report of Evatt & Co. (except for trade investment) and by a consideration of the written comments and representations made by the first defendant so far as such written comments and representations came within the ambit of clause 4 of the agreement dated the 14th of March 1968. The adjudicator has consequently valued each share of Chua & Co. as on 31st December 1967 at $2.44¢.

Clause 6 of the agreement (A89) requires the adjudicator to "give his award *i.e.*, the *final figure* payable in respect of these shares of the second party to be paid by the first party." Evatt & Co. gave the value of each share of Chua & Co., the adjudicator only did what they had done. Each share of the plaintiff was valued by the adjudicator and each such share held by the plaintiff as on 31st December 1967 had to be paid for by the first defendant. What remained to be done was only a question of arithmetic. The final valuation by the adjudicator need not necessarily mean the total sum which he determined as payable by the first defendant in respect of the shares of the plaintiff in the partnership. The word "final" also means conclusive or which comes at the end or which may be decisive. While it may be said that the figure given by the adjudicator is not final in the sense that it fails to multiply 62,475 shares held by the plaintiff in Chua & Co. by $2.44, yet the valuation given by the adjudicator is conclusive in the sense that it determines according to his own judgment which was binding on the parties what the first defendant's liability was to be.

A party is at liberty to impeach the valuation on the grounds of fraud, mistake or miscarriage of justice (see *Dean* v. *Prince*).[14] The valuer's duty is to hold the scales even with the parties and decide impartially. The defence of the first defendant is not that the valuation made by the adjudicator is not *bona fide* but that there is no valuation in fact. Quoting again from *Halsbury's*, third Edition, Vol. 39, page 6,

"where an agreement has been made for the sale or purchase of property and the agreement provides that the purchase price has to be fixed by valuation, the valuation when made is final and conclusive although it may appear high or even possibly exorbitant, if it represents the *bona fide* opinion of the valuer."

It was urged that the adjudicator did not consider the question of loss occasioned by the plaintiff to the partnership in his dealings with Chua Sin Ean. I am of the view that even if there was such a loss sustained by the partnership on account of prohibited dealings

by the plaintiff under clause 15(c) of the partnership agreement (A1), this was totally irrelevant in view of the terms and conditions of the agreement dated the 14th day of March 1968 (A89) between the plaintiff and the first defendant.

There is no allegation of any dishonest intention on the part of the adjudicator and there is no evidence before me on which I can hold that the valuation given by the adjudicator was not *bona fide* and that he did not take into consideration matters which he should have. The valuer can make the valuation by a consideration of all the materials before him including his own personal skill and knowledge of things and he is not bound to itemise his valuation. He may award one sum generally in respect of claims submitted to him unless the agreement requires him to award separately on some one or more of them. In the case of arbitration the courts lean towards the construction that the award is *prima facie* good and certain and that it is for the defendant to show otherwise. I see no reason why the same rule should not apply to the case of a valuer. The courts are inclined to support the validity of an award and make every reasonable intendment and presumption in favour of its being a final, certain and sufficient determination of the matters in dispute. Where an award is good on its face it is presumed in the absence of evidence to the contrary that everything has rightly and regularly been performed. The award of the adjudicator (A103) (or valuation as it should rightly be called) is a document which speaks for itself. There can be no reasonable doubt on the face of it as to the adjudicator's meaning. It may be said that the date on the "award" (A103) is not correct and that the valuation shown is as on 31st December 1968 and therefore on the face of it, it is what it was not required to be. The question, however, is whether there can be any reasonable doubt as to the meaning of that award. I find no such doubt. As far as issue no. 2 is concerned I consequently hold that the award made by Mr. Koh Kim Leng is final.

Having decided issues nos. 1 & 2 in favour of the plaintiff, I do not think any purpose would be served by a consideration of the 3rd issue. In fact the 3rd issue does not arise. If *estoppel* is intended to be relied on it is necessary *for the plaintiff* to plead it so that the defendant can show that there can be no estoppel. The *defence* of estoppel, however, can always be raised if it is borne by the facts proved or admitted even if those facts have not been specifically pleaded. No plea of estoppel has been raised by the plaintiff against the defendants and the defendants cannot say that it should be used against them.

I may at this stage deal with the defence of the second defendant. It does not say that it was not a party to the agreement dated the 14th day of March 1968 between the plaintiff and the first defendant and therefore is not bound by the adjudicator's award. In fact as I have said earlier the knowledge by the bank of the existence of the contents not only of that agreement but also of the award made by the adjudicator is evident from its own defence. Its liability, however, cannot depend upon its knowledge of those facts. It can only arise out of the guarantee given by it on the 22nd day of December 1967. The first operative paragraph of that guarantee states:

> "NOW WE HEREBY GUARANTEE that the purchase price to be ascertained or fixed *as aforesaid* but not exceeding the sum of Dollars Sixty two thousand four hundred and seventy five ($62,475.00), shall become payable to you by us in the event of Tan Tuan Boon failing to pay the said purchase price to you within one (1) month from date of such ascertainment of purchase price *as aforesaid.*" (Italics supplied).

It is a case in which the recital in the guarantee throws light on the intention of the parties as to the meaning to be given to the operative part of the guarantee. The second recital in the guarantee (A41) refers to the partnership agreement dated the 1st day of June 1965 and the method of ascertaining or fixing the valuation as provided therein. The third recital states that a banker's guarantee was being given for the purposes of enabling the partnership business of Chua & Co. to be continued pending the ascertainment of the purchase price *by the method provided in the partnership agreement dated the 1st day of June 1965.* The payment that the bank guaranteed was the payment which was fixed or ascertained by the method provided in the partnership agreement dated the 1st day of June 1965. On the date this guarantee was given the agreement between the plaintiff and the first defendant had not come into existence. I am therefore of the view that the plaintiff cannot rely upon the guarantee given by the second defendant in his present claim which is based entirely on the agreement between him and the first defendant and the award made by the adjudicator. The second defendant at no stage extended the terms of its guarantee to include the method of ascertaining the purchase price other than that contemplated in the partnership agreement dated the 1st day of June 1965. I do not think there is any substance in the contention of the second defendant in its insistence upon its fulfilment of the conditions precedent when it admits that the plaintiff was at all material times ready and willing to execute all the necessary documents which he was required to execute. Payment to the plaintiff and the execution by him of the documents were to be concurrent acts. I would therefore dismiss the plaintiff's claim against the second defendant with costs.

Paragraph 1 of the statement of claim is admitted by the first defendant. This means that he admits that the plaintiff owned 62,475 shares in Chua & Co. Each of such shares has been valued at $2.44 by the adjudicator. This valuation is final and binding on the plaintiff and the first defendant. There will therefore be judgment for the plaintiff against the estate of the first defendant for $152,439. As the first defendant was liable to pay the amount only on or before 5th January 1969, the plaintiff is entitled to interest only as from that date. The interest payable by the estate of the first defendant will be at the rate of 5% per annum from 5th January 1969 to the date of payment. The plaintiff will also have his taxed costs against the estate of the first defendant.

Claim against the first defendant allowed.

Claim against the second defendant dismissed.

Solicitors: *Skrine & Co.; R. R. Chelliah Bros.; Allen, Gledhill & Ball.*